AUG 22 1944
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 378

COMMERCIAL CREDIT COMPANY, A CORPORATION,
Appellant,

vs.

GEORGE O'BRIEN, AS COUNTY TREASURER OF THE COUNTY OF SILVER BOW, STATE OF MONTANA; BERNARD E. HOLLAND, AS CITY TREASURER OF THE CITY OF BUTTE, COUNTY OF SILVER BOW, STATE OF MONTANA; THE COUNTY OF SILVER BOW AND THE CITY OF BUTTE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA.

STATEMENT OPPOSING JURISDICTION.

Counsel for Appellees.
R. V. BOTTOMLY,
Attorney General of Montana,
Attorney for Appellees.

I. W. CHOATE,
Tax Counsel, State Board of Equalization;
FRED LAY,
Assistant Attorney General of Montana,
Of Counsel for Appellees.

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COMMERCIAL CREDIT COMPANY, A CORPORATION,
Appellant,

vs.

GEORGE O'BRIEN, TREASURER OF SILVER BOW COUNTY, MONTANA, ET AL.,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA.

STATEMENT OPPOSING JURISDICTION.

To the Honorable, the Supreme Court of the United States:

Now come the appellees and file in the Supreme Court of Montana (being the court possessed of the record herein) the following statement of matters and grounds making against the jurisdiction of the court invoked herein.

I.

This Cause Does Not Draw in Question the Validity of Any Montana Statute, Nor Did the Court's Judgment Apply Any Montana Statute in Such Manner as to Infringe upon Appellant's Constitutional Rights.

Appellant invokes the jurisdiction of the court under Section 237 (a) of the Judicial Code, as amended, and as-

serts that there is drawn in question, in this case, the validity of a statute of the State of Montana (Sec. 2002, R. C. M. 1935) on the ground that as *applied to appellant* in this case, said statute violates the due process and freedom of contract clauses of the 14th Amendment to the Constitution of the United States, in the following particulars:

1. By taxing appellant on property it did not own on the taxing date.

2. By taxing appellant on intangible personal property beyond the taxing jurisdiction of the state.

3. By impairing appellant's right to contract with its parent corporation, the Delaware Company.

4. By failing to give effect to the agreed statement of facts, and basing its judgment upon "inferences and presumption" allegedly contrary to the agreed statement, and upon facts not in issue in this case.

Examination of the opinion of the Supreme Court of Montana discloses the following facts:

First: That said Section 2002 is neither cited, construed nor anywhere referred to therein.

Second: That the Court did *not* hold that Section 2002 authorizes the taxation of appellant upon property not belonging to it. Nowhere in its opinion does the Supreme Court of Montana declare the law that appellant may be taxed on intangible personal property which it does not own, or which is located beyond the taxing jurisdiction of the state on the taxing day. What the Court *did* hold is, that the acquisition by one corporation of all the shares of stock of another effects a temporary consolidation so long as such ownership continued. That the Montana and Delaware corporations of the same name, parent and subsidiary,

had, by their operations and conduct, effected a "merger" of their identity, and are to be treated as a single concern for purpose of taxation on intangibles regularly and habitually used and employed by such corporations in their business in Montana. As to the asserted power to tax intangible personal property beyond the taxing jurisdiction of the state, no such law was announced by the Court. Instead, the Court held that where intangible personal property, such as solvent credits or accounts receivable are created and used in the conduct of a business by the owners thereof, in a state other than the owner's domicile, such property has, for taxation purposes, a situs in the state where such business is conducted.

As to the alleged impairment of freedom of contract, the Court held that a contract purportedly entered into between a parent corporation and its wholly owned subsidiary, was a nullity for lack of assent by two separate individual minds under the maxim that one cannot make a contract with himself.

The Court declined to sanction the theory that for taxation purposes the two corporations, Commercial Credit Company, a Montana corporation, and Commercial Credit Company, a Delaware corporation, must, for all purposes, be regarded as separate and distinct entities whose contracts with each other must be upheld and given effect as such. Instead, the Court held that the Montana corporation was in truth and fact but the "other self" of the Delaware corporation; that because the Delaware corporation owned all the stock of the Montana corporation and completely dominated its affairs, the two companies had, in legal effect and regardless of names and forms, merged their corporate identity, and the Montana corporation in truth and fact functioned only for the business convenience and benefit of the Delaware corporation. The Court held

that because of this actual identity of the two corporations, and the complete domination of the Montana corporation as a tool or agency of the Delaware corporation, it was the Delaware corporation which, in truth and fact, was "doing business" in Montana through the Montana corporation, and, therefore, the alleged contract between the two concerns was of no force or effect so far as Montana's right to tax its subject matter was concerned.

Alleged Disregard of Agreed Statement.

As to the alleged failure to give effect to the *agreed statement*, we submit that the record nowhere shows that the Court "controverted or avoided" the agreed statement. However, in one particular it *did* draw a conclusion of law from the facts presented in the agreed statement, which was at variance with *one recital only* of the agreed statement; namely, the recital that "the Delaware corporation has no office, and does no business in the State of Montana." This provision of the agreed statement was in flat contradiction of *other facts* which appeared therein. The Court was therefore confronted with the necessity of deciding the case upon either one or the other theory, both of which found support in the agreed statement. The Court chose to disregard the allegation of the agreed statement, that the Delaware corporation "did no business in the State of Montana," and it therefore held that through its *alter ego*, the Montana company, the Delaware corporation actually did business in Montana.

Said the Court: (Quoting from Page 10 of the Opinion)

> "In complying with the Montana statute, upon the final payment of the Conditional Sales Contract, someone 'does business' in this state, and that someone is either the parent company as alleged owner of the receivables, or the plaintiff company as the agent and *alter ego* of the parent company."

As stated in the concurring opinion of Chief Justice Johnson: (P. 24 (a) of the Opinion)

> "As a matter of fact the Montana company, and not the Delaware Company maintained the offices and transacted the business in Montana; but, as a matter of legal effect, under the circumstances shown, the offices and the business were those of the Delaware Company."

Furthermore, as pointed out by the Chief Justice in his concurring opinion, the recital that the Delaware company did not do business in Montana was essentially a conclusion of law, and, accordingly, it came within the rule that,

> "The parties are not necessarily bound by conclusions of law and fact contained in the stipulation, and are not so bound where the conclusions are not warranted by the facts stated."

60 C. J. Page 83, Sec. 76. Citing:

Hart v. *Turner*, 226 Pac. 282; 39 Ida. 50;
Lyon v. *Robert Garrett Lumber Co.*, 92 Pac. 589; 77 Kans. 823;
Day v. *Old Colony Trust Company*, 117 N. E. 252; 228 Mass. 225;
U. S. Whaling Company v. *King County*, 165 Pac. 70; 96 Wash. 434.

Under the above circumstances we submit that the Court did not "assume against the Delaware company a variety of additional facts which were not covered by the agreed statement, or which were directly controverted by it."

Whatever conclusions, either of law or fact, followed logically from the Court's holding that the Delaware company was "doing business" in Montana, the Court surely had a right to make them, and it did not thereby infringe upon due process. Accordingly, its holding that the re-

ceivables had a "business situs" in Montana was justified as a conclusion logically and necessarily following from the facts which indicated the doing of business in Montana by the Delaware corporation through its subsidiary, the Montana corporation.

The Decision of the Supreme Court of Montana Is Based upon Adequate Nonfederal Grounds, Thereby Precluding Its Review by This Honorable Court.

Subject to the qualification that the non-federal grounds must be tenable, a judgment of a state court which is based on independent non-federal grounds broad enough to sustain it cannot be reviewed.

Ward v. *Love County*, 253 U. S. 17-22; 40 S. Ct. 419; 64 L. Ed. 751.

The grounds upon which the Supreme Court of Montana based its decision are the following:

1. The receivables (solvent credits) involved in this action had acquired a business situs in Montana and were taxable there.

2. By their acts and conduct the Commercial Credit Company, a Montana corporation, and the Commercial Credit Company, a Delaware corporation, had effected a merger of their corporate identity, and must be treated as a single concern for the purpose of taxing the intangibles regularly and habitually employed by them in their business in Montana.

3. The Commercial Credit Company, a Delaware corporation, was "doing business" in the State of Montana through its *alter ego*, the Commercial Credit Company, a Montana corporation.

4. No one can make a valid contract with himself; hence, the contract for the transfer of the receivables purportedly entered into between the two corporations, parent and wholly owned subsidiary, was a nullity so far as the state's power to tax its subject matter is concerned.

5. In failing to disclose when the parent Delaware corporation ceased to do business in Montana, and it appearing that the domestic Montana corporation was merely the *alter ego* of the foreign corporation, the agreed statement was insufficient to sustain judgment for plaintiff. None of these grounds involved any federal question; all of them involved matters of state law and procedure, and all of them were based upon adequate state grounds. Whether the Montana court's decision upon matters not subject to its jurisdiction was right or wrong, this Court will not inquire. (Hughes Federal Practice, Vol. 5, Sec. 3227, P. 321. Citing *Ark. So. Ry. Co.* v. *German Nat'l Bank*, 207 U. S. 270; 52 L. Ed. 203.)

If a Substantial Federal Question IS Involved in This Case It Was Not Properly Raised and Passed on in the State Courts, Being Presented Only in the Briefs and Not Raised in the Pleadings.

It plainly appears from appellant's statement as to jurisdiction under the heading "Manner in which Federal Question was Raised," that the alleged Federal questions were not raised in the pleadings, and that the only way in which they were attempted to be raised in the State courts was in the briefs of counsel. Neither is it established that under Montana practice appellant may raise a constitutional question for the first time in its brief, either in the trial court or in the Supreme Court of Montana, so as to bring this case within the doctrine of *Memphis Gas Co.* v. *Beeler*,

315 U. S. 649. On the contrary, the rule in Montana is (*State* v. *State Bank of Moore*, 90 Mont. 539; 4 Pac. (2nd) 717) that where it is contended than an act invades constitutional right, a person affected should raise the question of the invalidity of the act at the earliest opportunity, and failing to do so may constitute a waiver of the right. This is in accord with the general rule as stated in 12 C. J., Page 785, Sec. 216, that a constitutional question must be raised at the earliest opportunity, or it will be considered as waived. Citing:

Nagel v. *Bosworth*, 148 Ky. 807, 147 SW. 940;
Miller v. *Connor*, 250 Mo. 677, 157 SW. 81;
George v. *Quincy, etc., R. Co.*, 249 Mo. 197, 155 SW. 453;
Dahnke-Walker Milling Co. v. *Blake*, 242 Mo. 23, 145 SW. 438;
Dudley v. *Wabash R. Co.*, 238 Mo. 184, 142 SW. 338;
Street v. *St. Joseph School Dist.*, 221 Mo. 663, 120 SW. 1159;
Bales v. *Roberts*, 189 Mo. 49, 87 SW. 914.

"Where the State Appellate Court makes no express ruling, but simply ignores or fails to notice a Federal question, the Supreme Court will decline jurisdiction if it appears that the question was not raised in the trial court as required by the State practice." Citing: Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, Page 111, Sec. 62. Citing:

Mutual Life Ins. Co. v. *McGrew*, 188 U. S. 291, 309, 23 S. Ct. 375, 47 L. Ed. 480, 63 L. R. A. 33;
Chicago Ind. & L. R. Co. v. *McGuire*, 196 U. S. 128, 131, 25 S. Ct. 200, 49 L. Ed. 413;
Jacobi v. *Alabama*, 187 U. S. 133, 135, 136, 23 S. Ct. 48, 47 L. Ed. 106;

Layton v. *Missouri*, 187 U. S. 356, 23 S. Ct. 137, 47 L. Ed. 214;
Morrison v. *Watson*, 154 U. S. 111, 115, 14 S. Ct. 995, 38 L. Ed. 927.

Nor can briefs be solely relied upon to raise a Federal question.

> "It is an established rule that briefs filed in the state courts form no part of the state court record for the purpose of Supreme Court review; and ordinarily they cannot be relied upon to establish that a federal question was raised, even if they are incorporated into the record sent to the Supreme Court."
>
> Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, Page 125, Sec. 74, citing:
>
> *Live Oak Water User's Ass'n* v. *Railroad Commission of State of California*, 269 U. S. 354, 46 S. Ct. 149; 70 L. Ed. 305;
> *Lynch* v. *State of New York, ex rel. Pierson*, 293 U. S. 52, 54, 55 S. Ct. 16, 79 L. Ed. 191;
> *Harding* v. *Illinois*, 196 U. S. 78, 25 S. Ct. 176, 49 L. Ed. 394;
> *Zadig* v. *Baldwin*, 166 U. S. 485, 488, 17 S. Ct. 639, 41 L. Ed. 1087;
> *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291, 308, 23 S. Ct. 375, 47 L. Ed. 480, 63 L. R. A. 33;
> *Chapin* v. *Fye*, 179 U. S. 127, 130, 21 S. Ct. 71, 45 L. Ed. 119;
> *Sayward* v. *Denny*, 158 U. S. 180, 183, 184, 15 S. Ct. 777, 39 L. Ed. 941.

Jurisdiction to review a judgment of a State court cannot be founded upon surmise or be sustained by reference to briefs and extrinsic statements.

Lynch v. *N. Y., Supra*, 293 U. S. 52.

For the foregoing reasons we respectfully submit that this Honorable Court is without jurisdiction to entertain the appeal herein, and that said appeal should be dismissed.

Respectfully submitted,

R. V. BOTTOMLY,
Attorney General of Montana,
Attorney for Appellees.

I. W. CHOATE,
Tax Counsel State Board of Equalization.

FRED LAY,
Assistant Attorney General of Montana;
Of Counsel for Appellees.